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THE EXPANSION OF THE COMMON LAW.

I. THE FOUNDATIONS OF JUSTICE.

The jurisprudence of the Western world is divided, for all practical purposes, between Germanic and Romanic law. Not that there is any such thing as an actual system of law derived wholly from Germanic or wholly from Roman sources; but there is no system whose formal structure is not, in the main, built on the one or the other of these foundations; unless indeed we ought to consider the law very recently established by the Civil Code of the German Empire as making a new departure in modern national jurisprudence. We may be allowed, in any case, to speak in the present tense, for historical purposes, of things as they were down to the close of the nineteenth century. Subject to this caution, it is generally true that the Continental nations of Western and Central Europe and the inhabitants of the colonies settled by them live under forms which, however modified by custom and recast in the codes of a more scientific age, are still those of Roman law. The Scandinavian lands are the only clear exception. Scandinavian law goes with the Germanic group; so does the isolated and very interesting system of Scottish law, notwithstanding that it put on a Roman face by a reception of Roman law and terminology, which is now known to have been late and superficial. The principal member of this group is, I need hardly say, the Common Law; the law of England carried around the world by English settlers, and now prevailing (with local modifications but with the same general princi-

ples) throughout the English-speaking parts of the British Empire beyond seas, the whole of the United States, except, I believe, one jurisdiction, and to a considerable extent, though partially and indirectly, in British India.

This, our law, is now a system capable of dealing with the most complex interests of modern affairs, and disposing of a variety of remedies adapted to different needs. It is alike ready to administer property in a friendly suit and to determine the disputes of rivals in trade; it will regulate the bounty of a charitable founder no less than it will punish crime. We call upon it to collect undisputed debts, and to grapple with the problems of high policy and public economy that are involved in commercial combinations. No development of business or science comes amiss to it. As commerce extends its operations and instruments, so does the law widen its conceptions. It learns from the masters of all crafts, and pays them with an ordered and secure life. If we inquire of its antiquity, we find that it has a continuous history of more than a thousand years. The Roman law, certainly, is older, some of it very much older. But the descent of the modern Civil Law of Europe from the Corpus Juris does not run smoothly. There are breaks and catastrophes. There are times of legal and of political anarchy, times when the Roman imperial law has to live, as it were, in hiding. The scientific study of it had to be laboriously revived in Western Europe, and to prepare the way for its reception as not merely a store of wisdom, but a rule claiming formal obedience; and that preparation was longer and harder, and the results less complete and universal, than we formerly supposed. The Common Law has not known any such interruptions. Political revolutions have fulfilled rather than destroyed its work; no tyrant or pretender has dared openly to lay hands on it. In the years when no man knew certainly whether Henry VI or Edward IV was king, judges might be removed and restored, but the king's law still held its certain place at Westminster; in the later time when there was no king at all in England, the course of justice was unaltered, except in formal style and titles. After the Restoration the statutes of the Commonwealth were treated as nullities, but no lawyer has ever attempted to discredit a judicial precedent of that

period merely on account of its date. The fact is so notorious that, if I vouch Wallace on the Reporters for the particular proof of it, I do so chiefly for the pleasure of vouching so learned and distinguished an American author.

Neither has there been at any time any wholesale revolution in our judicial methods. The history of our courts is continuous for more than seven centuries. Edward I's judges, though fully aware that they were improving both law and procedure, certainly did not suppose that they were starting a new system of law different from that of Henry III or Henry II, and certainly there is a sense in which we can now say that the law of King Edward VII, or of the State of Connecticut, is the same as the law of King Edward I. But there is also a sense in which it is paradoxical. An English or American practical lawyer of this day who adventures himself without special training among the documents of twelfth-century Anglo-Norman law, not to speak of any earlier generation, will find himself in a wild and strange land indeed. He will, in the first place, have very great difficulty in so much as making out what sort of world it is. He will meet with a crowd of strange terms and miss almost every familiar one. He will hear very little of a judge, nothing of a jury, nothing of professional advocates. In vain will he look for any recognition of what we now think elementary conditions of administering justice. No sign will appear of any rational or approximately rational process for deciding on disputed matters of fact. Oaths are counted, not weighed; the persons who swear are not witnesses; there is no evidence at all, in our sense, unless when a deed is produced. The court of the hundred or the county will seem more like a rather disorderly public meeting than a court of justice. Our modern observer may be apt to think that for a long time before and some time after the Norman Conquest our ancestors occupied such leisure as they had in cattle stealing by night and manslaughter and perjury in varying proportions by day; and as to some parts of the country he would not be very far wrong. He will certainly think that their justice was always crude, often barbarous, and very commonly inefficient. Nevertheless it is true that our modern Common Law has grown or been fashioned, or (lest we dispute

prematurely about the right word) has in some way come out of these rudiments, unpromising as they are at first sight. For it is there, and it has come there without any assignable break. From the beginning of the thirteenth to the middle of the nineteenth century there is no measure in the whole history of our legal system so revolutionary in form as the Judicature Acts in England or the introduction of "code pleading" in New York and other American states. The sheriff was with us before the Norman Conquest; he is with us still, and better known even among lawyers by his old English name than in the Latin disguise of *vice-comes*; his judicial functions, preserved or enlarged in Scotland, have disappeared in England, but he is still the chief executive officer of the law; he still performs his duties in person in America, though not in England except for ceremonial purposes; and I understand that in some American jurisdictions, where unsettled conditions have produced a certain reversion to the simplicity of our ancestors, the performance may still require a good deal of courage and activity. Criminal procedure has been changed, one may say, out of all knowledge since the thirteenth century; the Grand Jury is so much overshadowed by the later development of the petit jury that its functions might almost be neglected in giving a first general view of the present system to a layman or a foreigner; but in itself the Grand Jury is still very much what the Assize of Clarendon made it.

How shall we account for this combination of diversity with continuity, or where shall we find a likeness for it? Are we to think of the familiar gun that was repaired by being fitted with a new stock, a new lock and a new barrel, or the knife that a man kept forty years, giving it sometimes a new haft and sometimes a new blade? Or of an old house that has never been pulled down, but has been so much enlarged and altered by successive tenants, minded to improve it each for his own purposes, that hardly one room in it remains just as it was built? Or may we perchance discover, underlying all the confusion of detail, a real organic energy of growth, a "competence to be" and, not only to be, but to conquer?

We said that an Anglo-Saxon or Anglo-Norman county

court would probably seem to us, if we could see it, rather like an ill-managed public meeting. But perhaps the sheriff or one of the notables—the persons whom Bracton calls by the mysterious name of *buzones*—if he could be brought to see us and hear our comments, might have a word to put in. He might say: "Doubtless you are wiser than we were, as after so many generations you ought to be. Doubtless we were unlearned folk, and our justice was rough. A public meeting, if you like. But is it nothing that we did keep it public? Had we not some root of the matter there? See what your modern books say, and then consider your judgment on our barbarism." Looking into our books, we find that in the year 1829 (that is to say, in the time of high Tory reaction following upon the French Revolution and the Napoleonic wars) certain justices of Lincolnshire turned one Daubney out of their justice-room when he offered to appear as attorney for a defendant charged with unlawfully keeping a gun to kill game. Daubney sued the justices for assault, and had a verdict for nominal damages, and the question whether he ought to have been non-suited came before the Court of King's Bench. The case was argued on the point whether the party was entitled to appear by attorney on a summons at petty sessions. But the court decided it on the ground that, the proceedings being judicial, the plaintiff, whether entitled to be there as attorney or not, was entitled as one of the public. The justices might not be bound to hear him; they had no right to remove him if there was room for him in the place where they were sitting and he behaved himself decently. For petty sessions are a court of justice, and "it is one of the essential qualities of a court of justice that its proceedings should be public."[1] The jurisdiction and powers of justices of the peace are, I need hardly say, derived wholly from statutes; and Parliament has been sometimes more and sometimes less imbued with the spirit of the Common Law. When this judgment was given, some of the duties of justices under Tudor statutes were very distinctly of an executive, rather than a judicial, kind; and in fact, under the Restoration, if not later, their investigation of crime included, together with the work of a public

[1] Daubney *v.* Cooper 10 B. & C. 237, 240; 34 R. R. at p. 380.

prosecutor, much that we should now think appropriate to a police officer. But when we pass from the second to the third quarter of the nineteenth century, we find that the Parliament of Queen Victoria has taken a widely different course from the Parliament of King Philip and Queen Mary. The secret inquisitorial proceeding has become open and judicial; there is no longer an examination of the prisoner, but a preliminary trial in court, the police-court, which in modern times is to many citizens the only visible and understood symbol of law and justice. The magistrate's office is more public than ever; the feeling that judgment should be done in the light of day has been strong enough to reassert itself after a partial eclipse. No such feeling exists in Continental Europe, or none of comparable strength. Here we have one tradition, at any rate, which has persisted through all changes. Like other rules of practice, the rule of publicity is not quite inflexible; some few exceptions are allowed on grounds of decency or policy, and in some jurisdictions they have been confirmed or extended by statute. But as to these exceptions, reasonable as they are, it is significant that most of them are derived from the essentially Roman and Canonical procedure of the spiritual courts. The settled judgment of our ancestors and ourselves is that publicity in the administration of the law is on the whole—to borrow words used by my friend Mr. Justice O. W. Holmes in another context—worth more to society than it costs. It may be worth while to observe that the publicity of the court itself is one thing and the indiscriminate publication of reports is another; the distinction is rather easy to forget.

Another point of Germanic procedure must seem very strange to learned persons bred in the civilian tradition; and, so far as we can tell, it is immemorial. *Nunquam aliter viderunt esse*, as the jurors of a mediæval inquest might say. Namely, the parties before the court are wholly answerable for the conduct of their own cases. Litigation is a game in which the court is umpire. The rules are in the knowledge of the court and will be declared and applied by it as required. It is for the parties to learn the rules and play the game correctly at their peril. The court will not tell the plaintiff what step he ought to take next,

neither will it tell the defendant whether the plaintiff has made a slip of which he can take advantage. The umpire will speak when his judgment is demanded; it is not his business if the players throw away chances. Perhaps the analogy of field manœuvres is even more appropriate. The Red commander may push forward an unsupported battery into a crushing fire at short range from Blue's unbroken infantry. Nobody will stop him; he will learn his mistake when his guns are put out of action. So it was in the ancient hundred and county courts, and so it was in the king's courts that supplanted them. Such is, in substance, the rule of our law to this very day. The battles of pleaders which were fought before Our Lady the Common Law at Westminster for six centuries were true to an older tradition, and the tradition is still alive under all the changes of outward form. "The rule that the Court is not to dictate to parties how they should frame their case is one that ought always to be preserved. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law."[1] Even those rules are not generally enforced by the court, except on the application of a party. Pleaders may let a cause go to issue on demurrable pleadings if they choose, and there are, or under the old practice were, many reasons that might make such a choice prudent.

This neutral or expectant attitude of the court is significant for the substance as well as the practice of the law. It is as unsafe as ever it was to rely on the supposed authority of a case for a point not expressly discussed and passed upon, but supposed to be implied in the decision. "The attention of the Court was not called to that point"; many a plausible argument has been checked by that answer, always legitimate and sometimes complete. Another branch of the same principle is that, according the immemorial custom of Germanic procedure, the Court will have nothing to do with making inquiries to find out things for itself. It is not there to inquire, or to do anything of its own motion, but to hear and determine between parties according to the proofs which the parties can bring for-

[1] Per Bowen L. J. in Knowles *v*, Roberts (1888) 38 Ch. Div. 263, 270.

ward. Some things, undoubtedly, are notorious. The suitors of the county or the hundred are men of common sense as well as doomsmen; they cannot help knowing what all the neighbors know. The rules of judicial notice in our modern doctrine of evidence are only the scientific refinement of broad and popular postulates. But outside the bounds of manifest public knowledge, the Court knows nothing but what is properly set before it by the parties, and, except for quite recent statutory powers which in England are not much used, has no means of informing itself.

It is not so easy to give a short name to the principle now under consideration as to the rule of publicity which we mentioned first. We may call it, perhaps, the rule of neutrality. Nothing in our procedure is more characteristic, more settled, or more continuous. Any apparent exceptions to it in our earlier records may be explained by the special circumstances. Either the proceeding was not really judicial, or there was something abnormal about the jurisdiction, or the Court was acting on proof on which the parties had put themselves beforehand. It is easy, in these and other ways, to misunderstand the facts of archaic procedure if one has not grasped the principles. Thus we have a record from the time of King Cnut, in the first half of the eleventh century, where the Hertfordshire county court sent three of its members to speak with a certain lady against whom her son claimed land under some alleged grant or covenant made by her. It looks at first sight as if the court had sent a commission to take evidence for its own use. But it is really quite otherwise. The lady is represented in court by one Thurbil White; apparently he is the nearest male kinsman in right of his wife; but he says he does not know the case. Accordingly three thanes, who are named, and who doubtless were chosen as discreet and impartial persons, are forthwith deputed to see the lady, for she lives within an easy ride. They ask her what she has to say, and she emphatically repudiates her son's claim and declares that Thurbil's wife (who is present with her) is to succeed to everything. "Here sits Leoflad, my kinswoman, whom I grant both my land and my gold, both raiment and garment, and all that

I own, after my day." She bids them "do thanelike and well" by declaring her mind to the shire-moot and taking all its good men to witness. Practically the court is in this manner fully informed; but it has not assumed jurisdiction to administer interrogatories. Thurbil said he had no instructions, and therefore could not tell what to say. The court, for greater certainty, sends trusted members of its own body to take the instructions; there is as yet no such office as that of an attorney or counsel, much less any notion of communications with one's adviser being confidential. Obviously the lady was not only willing but eager to speak out, and there is no question of any one having authority to require it of her. When the thanes return to the court (which presumably had been disposing of other business meanwhile) they repeat the lady's declaration; but the court does not offer to do anything. It is for Thurbil to take up the cause, and now he knows what to do. "Then Thurbil White stood up in the gamot and asked all the thanes to give his wife clear the lands that her kinswoman granted her, and they did so." Whereupon Thurbil (the court having no written record of its own) prudently rides off to the nearest considerable church and gets a learned clerk to set down the whole matter in the blank leaves of a Gospel book. All that properly concerns us here is to see that the court does not act *ex officio*, notwithstanding first appearances. But we may as well sum up the formal aspect of the case to make the explanation complete. The plaintiff states a claim; it does not appear how he expected to make it good; but when it becomes known that there is a substantial defence, he is unable to bring any proof, and is not in a position to tender his own oath or require the defendant's. In fact he has nothing to say, and abandons the suit. Incidentally the defendant's kinsman has brought before the court the defendant's own declaration and her request that the court will bear witness to it; and this is granted without demur. I confess I do not know whether the action of the thanes is strictly a doom of the county court or only a solemn witnessing of the lady's deposition by its members; but I do not think any one would have appreciated the distinction at the time. Of the lady's title to the land and power to dispose of it

we are told nothing; Anglo-Saxon records are commonly inartificial in such matters; but the omission may be technically justified, for there is evidently no dispute on that score. Almost certainly the land was book-land, and the disposition—which was rather a deferred or "post-dit" grant than a will—was within the powers conferred by the terms of the book.[1] One cannot help surmising that the thanes of Herefordshire knew a good deal about the parties and their character, and it is curious that the lady's name is not given. Perhaps she was a very great personage.

We have, again, in the *Textus Roffensis*,[2] an account of the great county court held at Penender Heath in 1072, where Lanfranc recovered divers lands of the see of Canterbury against Odo, and procured a comprehensive declaration of its franchises. This was only a few years after the Conquest, and the procedure is obviously the old English procedure; the story is fairly plain, but not without pitfalls for the unwary. King William, on Lanfranc's complaint, ordered a special county court to be held: all the men of the county, and of adjacent counties too, both French and English, and in particular Englishmen skilled in the ancient laws and customs, were to meet. A little farther on we read the names of eminent persons who attended, including "Æthelsic, Bishop of Chichester, a very old man and most learned in the laws of the land, who was brought there in a wagon (*in una quadriga*) by the king's command, to discuss and explain the ancient legal customs." A modern reader unversed in archaic law might begin to think of special jurymen, expert witnesses and assessors. Indeed, it would not be very surprising if, on so great an occasion, the king, who held the Court by the Bishop of Coutances as his deputy, and knew from his experience as Duke of Normandy what an inquest was, had used exceptional methods. But it is quite clear that all the persons mentioned were members of the court and nothing else, though members whose age and experience gave special weight to their counsels. Even the venerable Bishop of Chichester, who received (as I read the somewhat ambiguous text) the unique honor of the king sending a cart

[1] Cod. Dipl. DCCLV. Essays in Anglo-Saxon Law, p. 365.

[2] Essays in Anglo-Saxon Law, p. 369; Bigelow, Plac. A–N–4.

for him, was in form only one doomsman among a multitude of equal fellow-doomsmen. It does not appear definitely how the customs claimed by Lanfranc were stated to the Court, but the case seems to have been conducted by Lanfranc himself. Nor does it appear whether Odo made any and what kind of defence. It is remarkable that the declaration of the court, as reported, is much against the interest of the crown, but the king does not seem to have made any difficulty. The point now before us, however, is simply that there is not any trace of inquisitorial procedure.[1] If there is anything in modern practice at all like King William's very just and reasonable precautions on this occasion, it may perhaps be found in the manner of making up the Judicial Committee of the Privy Council for a particular sitting, according as the appeals to be heard are from ecclesiastical courts, or from English-speaking colonies under the Common Law, or from India.

So far we have assumed that there is a litigation between parties, a matter of what we now call civil business. I need not remind you that, in archaic judicature, the distinction between public and private law, though we cannot say it is wholly ignored, is rudimentary. We need not, therefore, be surprised if the part of the State is wanting, or at any rate weak and vague, in Anglo-Saxon and Anglo-Norman criminal justice. The popular court has as little to do with official inquiry in a case of theft or manslaying as on a claim of title. It is merely the executor of the law on proof made in due form by oath or ordeal, or else on its own witness of manifest and undeniable facts, as where the slayer is taken red-handed, or the thief with the stolen goods. But when we come to the conscious and deliberate establishment of the king's justice, we might well expect such rulers as Henry II and Edward I to disregard the popular tradition and strike out some independent line; to take up a position of official and paternal authority, doing what seems best in their eyes for the general welfare and informing themselves by any means they

[1] Notwithstanding the opinion of some modern writers (in one case afterwards withdrawn), I can find nothing of the kind either in the Textus Ruffensis or in Eadmer. Indeed Eadmer's words, "Ex communis omnium astipulatione et indicio" seem to imply the contrary.

think fit, and for that purpose to introduce some kind of official procedure. For such a procedure the resources of the Canon Law could have easily supplied a model. There was no need, however, to go to the Canon Law. The king had, if he had chosen to see it in that light, a readier instrument in his own hand, ultimately of Roman origin but imported by the Conqueror as part of the Frankish administrative machinery which the Roman Court had adopted. This was the sworn inquest, a special and royal form of procedure with nothing popular about it in the first instance. Directly or through instructions to the sheriff, the king could appoint commissioners of inquiry on any system he chose, or on no system at all. Their finding on oath was only a report; it had nothing in common with the dooms of the popular courts; the king or his deputy had all the active control of the matter. There was no formal reason why the jurors should either inquire or report in public. It was not even obvious that they need always inquire at all, for the one point of practice which became fixed earliest was that they were chosen from the persons presumed to be best acquainted with the facts. Here, one would think, was ample material for a royal judicial system of a masterful inquisitorial type, overriding all the archaic popular traditions, and concentrating real power, as regards matters of criminal jurisdiction reserved to the king, in the hands of expert officials; and we know that the reserved cases, if we may convert that ecclesiastical term to a secular sense, tended to include, and in time did include, all serious offences. If we could now cut ourselves off from our knowledge of what actually came to pass later, we might well consider the most plausible inference from the state of English justice under Henry II to be that the popular element was doomed, and that, if it had any hope of successful development elsewhere, it must be in some country where the king's authority was much weaker. Any such forecast would, in fact, have been wholly wrong.

The personal designs and ambitions of the Anglian kings looked in quite other directions; and, although they certainly neither intended nor expected the jury to become a bulwark of popular liberty and the strongest protection against any attempt to tamper with the principle of pub-

licity, they did not intend the contrary. It never occurred to them to make use of the procedure by inquest, while its forms were still plastic, as a tool of absolutist policy. They considered the inquest merely as a useful working method of enlarging the king's jurisdiction and bringing well-earned profit in fines and otherwise to the king's exchequer, and the best way of promoting those ends was to develop the institution, or let it develop itself, along the lines of least resistance. Thus the popular instinct was left free to do its work out of sight and without raising alarm; and it found its firmest leverage just where the new procedure, in its earlier shape, might have been thought least democratic and most capable of serving, we will not say arbitrary power, but a system of official and paternal administration. Jurors are a set of men—twelve or some other number, that was a variable matter of detail to begin with—sworn and charged to report on certain facts presumed to be within their knowledge. Neighbors to the scene are therefore wanted. For getting at such men the ancient local divisions, hundred and township, are ready to hand, with their rough, but fairly sufficient, organization. So the new Frankish and Norman inquest was wedded, from the time of the Domesday survey onwards, to the old customs of the land; and the issue was more English than the English themselves had been. The jurors, grand or petty, were not mere official nominees; they were made representative that they might be satisfactory witnesses; but, once being representative, they carried a weight beyond that of mere witness; they stood for the judgment of the people, and became a social and political power. Later the judges, not only in the interest of the Crown, but to secure uniform administration of justice, found it necessary to give precise instructions to juries as to the questions of fact which were open to them, and lay down rules as to the testimony that might be received. This process did indeed set limits to the discretion of juries, but it confirmed their power and importance within the settled limits, and increased the dignity of their office. Verdicts took over the solemnity, one may fairly call it the sanctity, that had attached to the old popular judgments. All the conditions, even those which at first sight were unfavorable, worked

together for the continuance of the original Germanic ideals under more apt and efficient forms.

Moreover, to return to the point immediately before us, the concurrent application of the jury process to civil and criminal business tended to assimilate prosecutions at the suit of the Crown to litigation between individuals; and from the thirteenth century onwards the institution of justices of assize worked potently to the same end. The judge acting as a commissioner of gaol delivery could not dismiss from his mind the lessons which he had learned as an advocate, which his companion justice was putting in practice in the adjoining court as a commissioner of *nisi prius*, and which he might himself have put in practice in that capacity at the next term on the circuit. Slowly and fitfully, but in the long run surely, these constant forces produced their effect. More and more the king came to be regarded in his own court, not as the supreme head of national justice exhibiting and punishing the crimes which his officers had discovered, but as a party, though an exceptional and privileged party, bound to make his cause good. He was not an examining magistrate, but a plaintiff suing the prisoner before the judge and jury. The rule that a plaintiff must prove his case was applied to the king and his ministers, all the more effectively because it was taken as a matter of course, and not made a subject of panegyric; and when the political controversies of the seventeenth century brought its importance into light, it was too late to go back upon it. Encroachments and attempted encroachments of extraordinary on ordinary jurisdiction were indeed not wanting; some of them came very near success. We shall have to consider these later. At present I have only to point out, resisting the temptation of details, that they all ultimately failed. The ideals of the Common Law triumphed, and the rule that the burden of proof is on the plaintiff was carried over from the civil to the criminal side of judicature. It has long since become familiar in all men's mouths as the presumption of the prisoner's innocence; a venerable and still useful if not perfectly accurate phrase. Not that the result is arrived at by a strictly logical course. Our modern maxim quietly relegates the grand jury and its office to a position little better than ornamental. An intel-

ligent layman reading the common form of indictment with a fresh mind will have some difficulty in seeing why a man whom the body of the county has explicitly charged, on the oath of its lawful men, with such and such a crime, should claim the benefit of any presumption. As Sir James Stephen has said, "Why should a man be presumed to be innocent when at least twelve men have positively sworn to his guilt?" From the mediæval point of view he would be right enough. A man solemnly accused by the witness of his countrymen is more than half guilty, and our ancestors dealt with him accordingly. But the working of deep-seated national instinct is not bound to logic. It comes up to the light where best it can and acts on such material as it finds to hand. At present the assimilation of which we spoke is all but complete. The king or the commonwealth, on the prosecution of the Attorney-general or Nokes, as the case may be, sues John Stiles, and the general lines of a trial for felony differ little (in some jurisdictions, for aught I know, they may not differ at all) from those of an action for the price of goods sold and delivered. In some respects, indeed, there are differences in favor of the prisoner; and, so far as the grand jury has any effectual function at the present day, it is that of stopping frivolous or otherwise unsustainable prosecutions at an early stage. We have now, in most common-law jurisdictions, completed the analogy of criminal to civil proceedings by allowing the prisoner to be a witness on his own behalf. In England the change was strenuously opposed by some persons of great ability and experience, but is believed to be well justified by the results.

Yet another point is to be observed about our ancient county court. The law which is administered there is strange enough to modern eyes, but still it is some kind of law, and the court must have some means of ascertaining it. Where does the court find its law? Does it follow the letter of some sacred writing? Does it take the rules from a king, or a priesthood or any body of persons having any sort of official authority? Where technical and official designations are still so vague and in an early stage of formation, it is not very easy to put our question in any terms wholly free from anachronism. But in substance

this is a real question admitting of a real answer, and, whatever may be the least incorrect form of expressing either in modern language, the substance of the answers is in the negative. The court has no external authority to look to. For every case it must find its own law, for there is no other than that which is declared to be law by the court. Indeed, the law of the land may be said to live in the witness of the county and the hundred. It is not clear that there was any other authority even for the text of the dooms issued from time to time by the king and his wise men for the purpose of consolidating, amending, or supplementing the customary rules. The suitors of the court had to take on themselves the burden of knowing the law as well as of applying it. The king and the Witan can to some extent make law, though it certainly was not supposed in the twelfth or thirteenth century that the king, with or without his council, had anything like the unlimited legislative power which our modern constitution ascribes to the king in Parliament; but only the court can interpret the law they have made. In other words, interpretation is a strictly judicial function with which neither the executive nor the legislative power has anything to do. This is as ancient as any tradition of the Common Law, and it is still in full force on both sides of the Atlantic. Not that the suitors of the old popular courts need be presumed to have given their dooms capriciously or without advice. It is true that we do not find any one officially entitled to instruct them; for the sheriff summons the court and presides, but has no voice in giving judgment. There does not appear in our documents any definable person wielding such an authority as in Iceland, in a corresponding stage of the closely allied Scandanavian institutions, was attributed to the "Speaker of the Law"; nor am I prepared without evidence to postulate his existence. Yet we need not doubt that there was always some man, or a small group of men, whose opinion about a disputed point of custom did in fact carry great weight. It is indeed a matter of human nature rather than of positive institution that in every assembly whose whole number is not very small there will be a few members more capable or more active than the rest who, in Bacon's phrase, sway all the business. The

legal independence of the doomsmen in the county and the hundred court is, however, what now concerns us; and it is well attested. Only in the case of divided opinion, it seems, the sheriff, as the king's executive officer, had a discretion to act on the opinion of the majority or wait for the judgment of another court.[1] But the courts of the hundred and the county are, as we all know, long since extinct. How then has their custom survived?

As time went on the popular courts faded into insignificance, then into oblivion; the name and functions of the ancient doomsmen vanished, and the law was delivered in the king's courts by the king's justices. We have already said that an impartial observer in the thirteenth century might well have expected the jury to become a strictly official piece of machinery. Not less might he have expected the king's judges to regard themselves and to be regarded as mere exponents of the king's will, and to prefer the interests of the Crown to all other considerations. But it fell out quite otherwise, professional tradition and public spirit were too strong for royal influence. As early as the thirteenth century the judges were the servants of the law first and the king afterwards. Opinions might plausibly differ, before the Revolution of 1685, as to the amount of power which the law conferred on the king; but even in the worst of times only the weakest and the worst of lawyers could be found to give any countenance to the extreme royalist pretensions that would fain have set the king above the law. Certainly the power of the king's judges, a compact body of learned persons directly representing the king's authority, was very great. Their office was, and is, deliberately exalted. To this day justices of assize take precedence, while they are on their circuit, of all other persons in the county.[2]

No less certainly the judicial power was used with great

[1] P. & M. Hist. E. L. i. 552–3.

[2] The sheriff who is otherwise the first person in the county, though it is not quite settled whether he comes before the Lord-lieutenant, has a writ of assistance directed to all archbishops, bishops, etc. The commissioners of assize are accompanied by a like writ directed to the sheriff himself. Not that a commissioner of assize need be a judge; but the working commissioners have always been, as a rule, judges of the superior courts, and their special dignity is for all practical purposes merged in that of the judicial office.

freedom to repress diversity of local customs and establish uniform rules as far as the jurisdiction of the king's courts extended. But the courts were really doing the work of the ancient tradition, inasmuch as the uniformity which they established was not according to the king's pleasure, but according to law, and was far more capable of resisting executive interference than the customs which it superseded. If rival provincial customs had been allowed to take defined form, they might have invited an overruling despot. The Custom of the Realm was another matter.

In countries where judgment and justice were local and multiple, every development of rules within this and that limited sphere might seem obnoxious to the central authority as tending to paternalism. In England the guardians of custom which was not particular but general, were intimately connected with the central authority itself, and the sanctity of customary law was indistinguishable from that of all institutions and dignities, royal and others. The king's own power had nothing better to rest on, for we are speaking of times long before the speculative doctrine of divine right was invented.

A further development, already foreseen in the thirteenth century and settled beyond questioning in the fifteenth, is that which gives our jurisprudence its most peculiar and striking character. Judicial interpretation of the law is the only authentic interpretation. So far as the particular case is concerned this may seem an obvious matter. Positively, the court is there for the purpose of deciding, and has to arrive at a decision. Negatively, no other authority has any right to interfere with a court of justice acting within its competence; this is perhaps not quite so obvious, but may be supposed to be the rule in all or very nearly all civilized jurisdictions. But the Common Law goes much beyond this immediate respect for judicial authority. The judgment looks forward as well as backward. It not only ends the strife of the parties but lays down the law for similar cases in the future. The opinion of a Superior Court embodied in the reasons of its judgment stands, with us, on a wholly different footing from any other form of learned opinion. I am not aware that any historical reason can be given for this other than the early consoli-

dation of royal jurisdiction in England, and the administration of justice by the king's judges on a uniform system throughout the country. Probably we shall never know how much they simplified, or whether their methods were always what we should now call strictly judicial. But we know that in the time of Henry I, it was still possible to talk of distinct bodies of custom as existing in Wessex, in Mercia, and in the Dane law; that in the time of Henry II, there were still undefined verities of usage, which may or may not have been confined to precedence and to the rules of inheritance; and that in the time of Henry III, men spoke only of the laws and customs of England, and whatever did not conform to the Common Law as declared by the king's court had to justify itself as an exception on some special ground. The king's judges, and they alone, had power to lay down what the general custom of England, in other words the Common Law, for the terms are synonymous in our books, must be taken to be. Quite possibly their own views of convenience counted for something in the process of determination; at the same time it is certain that, so far as universal or very general usage really existed, the king's judges, doing the king's business in all parts of the country and comparing their experience at Westminster, were the persons best qualified to know it. The law of the thirteenth century was judge-made law in a fuller and more liberal sense than the law of any succeeding century has been. Laymen sometimes talk of judge-made law as if judges were legislators and could lay down any rule they chose. It is needless to explain to a legal audience that this is not so. Judges are indeed bound to find some rule for deciding every case that comes before them, but they must do it without contradicting established principles, and in conformity with the reasons on which previous decisions were founded. They may supplement and enlarge the law as they find it, or rather they must do so from time to time, as the novelty of questions coming before them may require; but they must not reverse what has been settled. Only express legislation can do that. But even now there are a certain number of cases "of the first impression." In the thirteenth century their number was large.

Henry III's and Edward I's judges did not rejoice in,

or groan under, a library of printed reports; they had many new cases and little recorded authority, and were almost compelled to be original. But they certainly intended to be consistent, and were aware that their judgments were regarded as fixing the law. One reason why judicial precedents acquired exclusive authority was the absence of any other source of law capable of competing with them. Legislation was still exceptional and occasional, and there was no independent learned class. When the king's court began to keep its rolls in due course, the rolls themselves were the only evidence of the principles by which the court was guided; and the earliest treatises on the Common Law were produced by members of the judicial staff, or under their direction. It is also to be considered that the king's courts, as their functions became defined, had to regulate their own procedure if there was to be any order at all in their business; and that, in a state of government where both law and procedure are new, it is hard to draw an exact line between them, or to provide for urgent matters of procedure without determining the bent of the law itself. Sir Henry Maine's observations on the dominant importance of procedure in archaic law may now be called classical, and are presumed to be familiar to all historical students.

Thus the king's courts were driven, in more than one way, to be self-sufficient. Willing or not they would still have had to make their own practice, and in doing so they could not help making a good deal of law. Not that we have any reason to look on the judges of the thirteenth and fourteenth centuries as persons unwilling to rise to the height of great responsibilities. Some of them were wiser and more valiant than others. We may see in Bracton opinions which, if they had prevailed, would have taken away grave reproach from the law, but which did not prevail because they were too bold for their day. But on the whole, the makers of English law and polity in the critical period of construction were not lacking in either wisdom or valor.

Another consequence of the greatest moment for public law and liberty followed from the exercise of a single and supreme judicial power at the king's judgment-seat and in

his name. There was no question of setting up immunities or privileged law for the king's servants, no claim that acts of State should be above the law of the land. Who should judge the king's servants if not the king's own judges? True, there were diversities of jurisdiction and procedure, of which we read with amused curiosity in Blackstone; but the eagerness of every court to attract business to itself made short work of them, swamping them in fictions which were certainly beneficial, and, as they were too barefaced to deceive any one, may fairly be called innocent. It is true, again, that there came a time of high prerogative doctrine and extraordinary jurisdiction, when counsellors who were statesmen first and lawyers afterwards could exhort the king to make the judges know their places as "lions under the throne," and had plans for removing matters where the Crown was concerned from the ordinary courts.[1] But then it was too late. The tradition of the Common Law was fixed, and all the pride of a distinguished and influential profession was enlisted in its support; and, what was more, the people had come to know and value it.

We come around, then, by ways at first sight devious and unlikely to the affirmation and even strengthening of the ancient rules. Courts of justice are public; they judge between parties, and do not undertake an official inquiry, not even in criminal cases or in the affairs of State; the court itself is the only authorized interpreter of the law which it administers; and there is no personal or official privilege against its jurisdiction.

These are the principles of which we find the rudiments in the earliest justice of our ancestors; which was maintained and developed through all political vicissitudes in English history, and crossed the Atlantic with the institutions and traditions of the mother country; and which still distinguish the administration of the law in every quarter of the world and every jurisdiction where the Common Law has taken root.

[1] See Dicey, Law of the Constitution, 6th ed., 346–348; Bacon, Essay of Judicature.

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